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No. 94-466

In The

Supreme Court of the United States

October Term, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

MOTION OF GENERAL MOTORS CORPORATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF DIAMOND SHAMROCK REFINING AND MARKETING COMPANY'S PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

General Motors Corporation, by and through its counsel of record, Edward Kliewer, III, of Foster, Lewis, Langley, Gardner & Banack, Incorporated moves the Court for permission to file a brief amicus curiae in the

above entitled case. This motion is made upon the following statements.

STATEMENT AS TO CONSENT

Petitioner Diamond Shamrock Refining and Marketing Company has consented in writing to the filing of the subject amicus brief.

Respondents Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District have declined in writing to consent to the filing of the subject amicus brief.

STATEMENT OF INTEREST OF GENERAL MOTORS CORPORATION

The domestic motor vehicle industry is a major factor in the economy of the United States, in terms of its output, the jobs it creates, the income it generates, and the taxes it pays. Over the last three decades, spending on new vehicles has averaged 4.4 percent of the United States Gross Domestic Product. Collectively, the members of the American Automobile Manufacturers Association (AAMA) – GM, Ford and Chrysler – employ over 600,000 U.S. workers in auto-related jobs, making the motor vehicle industry the largest employer among United States manufacturing industries. Additionally, AAMA members support 900,000 jobs in the supplier industry. The sale and service of completed vehicles generates further economic activity. This includes the 18,000 dealer franchises which employ about 650,000 people who sell and service

the products of the domestic automobile industry and the more than 300,000 repair and service facilities that help to maintain the United States vehicle fleet.

General Motors Corporation has operations in fifty-three countries and worldwide employment averaging 711,000 people. Best known as a full-line vehicle manufacturer, GM had worldwide factory sales in 1993 of more than 7.8 million motor vehicles, of which approximately 4.7 million were sold in the United States. GM manufactures and sells cars and trucks worldwide under a variety of nameplates, including Chevrolet, Pontiac, Oldsmobile, Buick, Cadillac, GMC Truck, Saturn, Opel, Vauxhall, Holden, Isuzu and SAAB. In 1993, GM's market share was 33.2% of the total U.S. vehicle market and 18.2% of the worldwide vehicle market. As of December 31, 1993, there were approximately 8665 GM motor vehicle dealers in North America and approximately 9200 dealers overseas.

GM also has other substantial business interests. GM's Automotive Components Group Worldwide (ACG-W) supplies components and systems to every major automotive manufacturer. General Motors Acceptance Corporation (GMAC) and its subsidiaries provide financing and insurance products to GM customers and dealers. GM Hughes Electronics Corporation (GMHE) is a specialist in automotive electronics, commercial technologies, telecommunications and space and defense electronics. Another wholly owned GM subsidiary, Electronic Data Systems (EDS), is a world leader in applying information technologies. Electro-Motive Division is the world's second largest producer of diesel-electric locomotives, and Allison Transmission is the largest U.S. producer of heavy

duty vehicle transmissions. In total, GM's 1993 worldwide sales and revenues were $138.2 billion.

In 1993, GM paid a total of nearly $4.3 billion in taxes to U.S. and foreign taxing authorities, including $603,700,000.00 in property taxes. Customers who purchased GM products paid $1,203,600,000.00 in franchise, sales, use and other local taxes and another $3,529,400,000.00 in federal excise taxes and import duties or taxes on those products.[1]

At all times, GM has vast amounts of goods in transit both to and from foreign countries and among States in this country. At any given time, GM has in transit raw material and work-in-process to or in about half of the fifty States and finished products in all States. In Texas alone, GM currently pays about two million dollars per year in ad valorem personal property taxes that are properly assessed on GM goods. If the taxation of goods in transit, allowed by the Texas Supreme Court in this case, stands that figure will increase dramatically. GM further expects increases in property taxes and other types of taxes on goods in transit in other States. These changes in taxation will result not only in the increase in costs caused by higher taxes, but also in the increase in costly administration to track and account for all goods in transit for tax purposes.

Because of its leadership in world manufacturing and the vast sums of taxes paid by it on its materials and

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[1] These represent only those taxes paid by customers that were collected by GM and remitted to the appropriate tax authorities.

products, and by its customers, GM has a vital interest in fair and equitable state and local taxation policy and administration and all legal developments that affect such taxation. The issue in this case is an important one because of its potential impact on goods moving between countries as well as between the States in this country. Moreover, GM believes that the case has implications beyond property taxation; the principles decided in this case could affect not only ad valorem personal property taxation, but could be extended to other forms of taxation. GM, therefore, has a strong interest in ensuring that this Court's decision is made with full appreciation of the scope and importance of the issue concerned in this cause.

STATEMENT OF PURPOSE AND SCOPE OF AMICUS BRIEF

It is the opinion of General Motors Corporation that the issue before the Court is one of substantial national importance. General Motors Corporation believes that it is well situated to comment upon the national significance of the issue. It is therefore the desire of General Motors Corporation to undertake to briefly illustrate the importance of this case and to bring to the Court's attention certain additional authorities and argument relevant to the resolution of the case.

Therefore, General Motors Corporation respectfully requests permission of the Court to submit the enclosed brief in the above-entitled case.

Respectfully submitted,

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General Motors Corporation ("GM") respectfully joins as Amicus Curiae in Support of Petitioner, Diamond Shamrock Refining and Marketing Company's petition for writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

STATEMENT OF INTEREST OF GENERAL MOTORS CORPORATION

The domestic motor vehicle industry is a major factor in the economy of the United States, in terms of its output, the jobs it creates, the income it generates, and the taxes it pays. Over the last three decades, spending on new vehicles has averaged 4.4 percent of the United States Gross Domestic Product. Collectively, the members of the American Automobile Manufacturers Association (AAMA) – GM, Ford and Chrysler – employ over 600,000 U.S. workers in auto-related jobs, making the motor vehicle industry the largest employer among United States manufacturing industries. Additionally, AAMA members support 900,000 jobs in the supplier industry. The sale and service of completed vehicles generates further economic activity. This includes the 18,000 dealer franchises which employ about 650,000 people who sell and service the products of the domestic automobile industry and the more than 300,000 repair and service facilities that help to maintain the United States vehicle fleet.

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At all times, GM has vast amounts of goods in transit both to and from foreign countries and among States in this country. At any given time, GM has in transit raw material and work-in-process to or in about half of the fifty States and finished products in all States. In Texas alone, GM currently pays about two million dollars per year in ad valorem personal property taxes that are properly assessed on GM goods. If the taxation of goods in transit, allowed by the Texas Supreme Court in this case, stands that figure will increase dramatically. GM further expects increases in property taxes and other types of taxes on goods in transit in other States. These changes in taxation will result not only in the increase in costs caused by higher taxes, but also in the increase in costly administration to track and account for all goods in transit for tax purposes.

Because of its leadership in world manufacturing and the vast sums of taxes paid by it on its materials and products, and by its customers, GM has a vital interest in fair and equitable state and local taxation policy and administration and all legal developments that affect such taxation. The issue in this case is an important one because of its potential impact on goods moving between countries as well as between the States in this country. Moreover, GM believes that the case has implications beyond property taxation; the principles decided in this case could affect not only ad valorem personal property taxation, but could be extended to other forms of taxation. GM, therefore, has a strong interest in ensuring that this Court's decision is made with full appreciation of the scope and importance of the issue concerned in this cause.

STATEMENT AS TO SCOPE OF BRIEF AMICUS CURIAE

The issue before the Court has been ably addressed by Petitioner, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY in its petition for writ of certiorari. GM seeks to briefly address the importance of this case and to bring to the Court's attention some additional relevant authorities, focusing primarily on the Commerce Clause concerns.

REASONS FOR GRANTING WRIT

Diamond Shamrock asserts that both the Commerce Clause and the Import-Export Clause of the United States Constitution prohibit taxation by the States and their subdivisions of goods actually in transit. The Texas Supreme Court held that Diamond Shamrock's oil was in transit when the challenged tax was assessed but, nevertheless, held that the tax was not violative of either of the asserted constitutional provisions. (App. 12a). Essentially, that court held that whether goods are "in transit" is irrelevant – goods could be in transit and yet meet the *Complete Auto* test so that the tax would not be precluded. Contrary to the Texas Court's conclusion, the long-standing prohibition of taxation of goods in transit under the Commerce Clause remains applicable, and is embodied in the first and fourth prongs of the *Complete Auto* test.

I. THE TRADITIONAL IN-TRANSIT RULE REMAINS APPLICABLE.

It has long been the law under the Commerce Clause, that "the States may not tax property in transit." *E.g., Minnesota v. Blasius*, 290 U.S. 1, 9 (1933) (nondiscriminatory ad valorem personal property tax on cattle that was at rest in the State and held there at pleasure of the owner and as part of general mass of property within the state upheld); *Carson Pet. Co. v. Vail*, 279 U.S. 95, 101 (1929) ("ad valorem duties levied on all the property of the petitioner" held invalid because they interfered with interstate and foreign commerce); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 476 (1926) (personal property tax on logs in transit on river invalid); *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366, 376 (1922); *General Oil Co. v. Crain*, 209 U.S. 211, 229 (1908); *Coe v. Town of Errol*, 116 U.S. 517 (1886).

The Texas Supreme Court found that Diamond Shamrock's oil was in transit and that it was not held in Nueces County in storage or for any business purpose of the owner. (App. 6an.2, 8a). Indeed, the binding stipulation of the parties upon which the case was tried clearly specified that, at all times, the oil was in transit from its foreign sources to the Three Rivers refinery and any stoppage in Nueces County was merely to accommodate that transportation. (App. 57a-58a). Therefore, the taxation of this oil was prohibited by the Commerce Clause. The Texas Court nevertheless upheld the tax, holding that the fact that the oil was in transit was not significant. The court reached this result by applying the "[m]odern analysis . . . governed by *Complete Auto*. . . . " (App. 7a). Both

this conclusion and the result reached, however, are erroneous.

Complete Auto did not, as the Texas Court found, render the in-transit status of goods unimportant in Commerce Clause jurisprudence. To the contrary, the Court recognized the significance of the in-transit status in *Complete Auto*. The taxpayer claimed in the court below that its in-state transportation "was but one part of an interstate movement," and the tax was unconstitutional as applied to operations in interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277 (1977). The tax involved in the case, however, was a "sales tax" assessed "on sales of transportation services." *Id.* at 275, 277. In other words, the tax was on a discrete transaction rather than on goods themselves that were actually in transit. The Court found that the taxpayer's attack was based solely on cases that held "that a state tax on the 'privilege of doing business' is *per se* unconstitutional when it is applied to interstate commerce." *id.* at 278, 288-89. The Court overruled those cases because they had "no relationship to economic realities" and stood "only as a trap for the unwary draftsman." *Id.* at 279. Hence, the Court sustained the tax. *Id.* at 278, 289. While the Court announced the four-pronged *Complete Auto* test, it noted, and re-emphasized, that the taxpayer did not assert that the tax failed to meet any of the four prongs of that test. *Id.* at 277-78, 287. The Court specifically noted that no claim was made that the activity was not sufficiently connected to the state to justify the tax. *Id.* at 287. The Court's holding reflects that *Complete Auto* was not an in-transit case but that in an in-transit case which properly

challenged the connection of goods in transit to the taxing entity the tax would be invalid.

No post-*Complete Auto* case has challenged a tax actually on goods in transit. Nevertheless, the Court has on several occasions considered the in-transit status of goods and has applied the principles of the previous cases in resolving the contentions raised. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, ___ U.S. ___, 113 S. Ct. 1095, 1106 (1993); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30-38 (1988); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748-51 (1978); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 436 (1979); *cf. Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976). *Japan Line* is the only case in which an ad valorem property tax was considered and the tax was held invalid on foreign commerce considerations. *Japan Line*, 441 U.S. at 451-54. The court did not apply, but rather assumed compliance with, the four *Complete Auto* prongs. *Id.* at 445, 451. The tax in that case was not levied on goods in transit, but rather was on instrumentalities of commerce for which the immunity from taxation is not as broad as for goods themselves. *See id.* at 444. Before discussing the *Complete Auto* test, the Court noted that pre-*Complete Auto* cases "sustained property taxes as applied to various forms of transportation equipment." *Id.* The court thus signaled that some traditional, pre-*Complete Auto* principles apply despite the advent of *Complete Auto*. *See also Washington Stevedoring*, 435 U.S. at 748-51. Moreover, this Court explicitly announced that traditional Commerce Clause analysis would invalidate even nondiscriminatory property taxes on goods in transit. *Michelin*, 423 U.S. at 290, 290n.11.

Commentators have likewise recognized that *Complete Auto* did not affect the immunity from state taxation of goods in transit. *See* J. Hellerstein, I *State Taxation*, ¶ 4.11 at 134-38 (1983); Hartman, *Federal Limitations on State and Local Taxation*, § 2:18 at 103-04, § 7.3 at 382-83 (1981); W. Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 S. Ct. Rev. 99, 122, 124-26 (1976). One commentator has suggested that while direct taxes on interstate commerce do not violate the Commerce Clause, the taxation of goods in transit does because of the requirement that there be a substantial nexus between the taxing entity and the activity to be taxed. *See* J. Hellerstein, *State Taxation* ¶ 4.11 at 135-36. Another commentator, in discussing *Michelin*, noted the suitability of the standards under the Commerce Clause for resolving the in-transit issue under the Import-Export Clause and that those standards are "hardly new to the law" and remain applicable. *W. Hellerstein*, 1976 S. Ct. Rev. at 122, 124, 126.

The Texas Supreme Court erroneously asserted that the remaining validity of the "in transit" status is questionable in Commerce Clause cases, citing the *D.H. Holmes* case. (App. 10an.7). The language of *D.H. Holmes* quoted by the Texas court concerning whether the goods had come to rest merely answered the contention that the tax was improper because it was on interstate commerce itself, a contention expressly rejected in *Complete Auto*. *D.H. Holmes*, 486 U.S. at 30-31. In that case, the tax was on the *use* of goods, not on the goods themselves; hence the argument that the tax was only on the existence of the goods in the State was without merit. *Id.* at 31. Moreover, there was " 'nexus' aplenty" in that case – the taxpayer

had "13 stores and over $100,000,000 in annual sales in the State." *Id.* at 32-33. The case considered neither an ad valorem property tax nor goods in transit. Properly considering the *D.H. Holmes* case, particularly in light of the more recent and seminal *Quill* case, the Texas Court's conclusion drastically overstates the applicable law. *D.H. Holmes* in no way sanctioned a property tax on goods in transit nor indicated that there was sufficient nexus to support such a tax.

II. THE TRADITIONAL IN-TRANSIT RULE IS VINDICATED IN THE NEXUS REQUIREMENTS OF *COMPLETE AUTO*.

The Commerce Clause nexus requirement,[2] embodied in the first and fourth prongs of the *Complete Auto* test, vindicates the prohibition of taxation of goods in transit and that traditional prohibition should be retained. This nexus requirement "limit[s] the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce;" it is "a means for

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[2] The requirement that the activity to be taxed have a substantial nexus with the jurisdiction that seeks to impose the tax is an integral part of Commerce Clause and, indeed, of Import-Export Clause, analysis. *See Itel*, 113 S. Ct. 1105-06; *Washington Stevedoring*, 435 U.S. at 754-55; *Japan Line*, 441 U.S. at 451n.14. Few cases, however, have actually ruled upon the contention that there was an insufficient nexus to support a tax. *E.g.*, *Trinova v. Michigan Dept. of Treasury*, 111 S. Ct. 818, 829 (1991) (no dispute regarding substantial nexus); *Goldberg v. Sweet*, 488 U.S. 252, 260 (1988) (substantial nexus agreed); *Maryland v. Louisiana*, 451 U.S. 725, 754n.27 (1981) (unnecessary to reach local nexus claim); *Japan Line*, 441 U.S. at 445 (assumed *Complete Auto* test satisfied).

limiting state burdens on interstate commerce." *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S. Ct. 1904, 1913 (1992). The nexus requirement is grounded largely upon "concerns about the effects of state regulation on the national economy" and requires something greater than the "minimum contacts" required by the Due Process Clause. *Id.* The applicable prongs of the *Complete Auto* test require that the tax be (first) "applied to an activity with a substantial nexus to the taxing State" and (fourth) "fairly related to the services provided by the State." *Id.*; *Complete Auto*, 430 U.S. at 279. The first prong establishes a threshold test; the activity must have a substantial nexus with the taxing State before any tax may be levied. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). The fourth prong imposes an additional limitation that "the measure of the tax must be reasonably related to the extent of the contact" since it is the local activities of the taxpayer that may properly be made to bear a "just share of state tax burden." *Id.* This prong "is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989); *Commonwealth*, 453 U.S. at 625 (validity of tax rests upon whether constitutionally fair demand is exacted for aspect of interstate commerce to which tax bears special relation). "[T]he decisive issue turns on the operating incidence of the tax." *Commonwealth*, 453 U.S. at 625. "[T]he incidence of the tax as well as its measure [must be] tied to the earnings which the State . . . has made possible." *Id.* at 626; *see D.H. Holmes*, 486 U.S. at 32-33 (" 'nexus' aplenty" where catalogs distributed to improve sales in 13 stores in State). Moreover, "in the case of a tax on an activity, there

must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal, Inc. v. Director, Div. of Taxation*, ___ U.S. ___, 112 S. Ct. 2251, 2258 (1992). "[T]he State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities." *Id.*

Professor Jerome Hellerstein recognized that a tax on goods in transit implicates the nexus requirements of *Complete Auto*. J. Hellerstein, *State Taxation*, ¶ 4.11 at 136. He discussed the issue by reference to *Japan Line*, noting that the tax in that case was not on goods, but on instrumentalities of commerce. *Id.* He explained a simple but crucial distinction between instrumentalities and goods in transit: containers are landed in the taxing district to be loaded with goods for transport, while goods in transit are not landed for any such use to benefit the owner of the goods. *See id.* Professor Hellerstein thus recognized that the presence of goods in transit does not give rise to "earnings which the State . . . has made possible" and no protection, opportunities and benefits are conferred on that activity. *See id. See also, e.g., Allied-Signal*, 112 S. Ct. at 2258; *Commonwealth*, 453 U.S. at 625. Hence, mere presence does not provide a sufficient connection to the state in which the goods are present while in transit and the burden of a tax on such goods is unwarranted.

The Texas Court improperly upheld the tax in *Diamond Shamrock*. That Court held that there was a sufficient nexus to support a tax even if the goods were technically "in transit" because of the continuous presence of Diamond Shamrock's oil in Nueces County. (App.

12a) The court erred in so holding by equating nexus with situs for taxation.

Equating situs with nexus is erroneous because situs is a Due Process, not a Commerce Clause, concern. Unquestionably, the *Exxon* case, upon which the Texas Supreme Court relied, is a situs case which concerned Tex. Tax Code Ann. § 21.02. *Exxon Corp. v. San Patricio County*, 822 S.W.2d 269, 272 (Tex. App. – Corpus Christi 1991, writ denied). No question of foreign or even inter-state commerce was concerned in that case. *See id.* at 272. The concerns raised in such a situs case are Due Process concerns. *See id.* at 273-74, *citing, Aransas County Appraisal Review Bd. v. Texas Gulf Shrimp Co.*, 707 S.W.2d 186, 192 (Tex. App. – Corpus Christi 1986, writ ref'd n.r.e.) ("Whether property has a tax situs in a particular state is purely a due process question.").

Situs, however, does not equate with Commerce Clause nexus because the nexus requirements of Due Process and the Commerce Clauses are different and raise different issues. *Quill*, 112 S. Ct. at 1913. ("Despite the similarity in phrasing, the nexus requirement of the Due Process and Commerce clauses are not identical.") *Id.* Because of the differences in these clauses, the Court held that the tax concerned in *Quill* was not barred by the Due Process Clause, but was barred by the Commerce Clause. *Id.* at 1911, 1916.

Hence, the continuous presence analysis of *Exxon* is not applicable to the Foreign Commerce Clause question in this case. *See id.* at 1911. In holding that the Due Process Clause did not bar the tax in *Quill*, the court

noted that Due Process reasoning justified "the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State." *Id.* This continuity of activity was relevant to the Due Process determination, but not to the Commerce Clause question. *See id.* at 1910-14. As the court noted, the "minimum contacts" required by the Due Process Clause may be present while the "substantial nexus" required by the Commerce Clause is lacking. *Id.* at 1913-14. This is true because of the different constitutional concerns and policies that animate the two standards. *Id.* at 1913.

Due Process concerns "the fundamental fairness of governmental activity;" the concept addresses whether a person's connection with a state is substantial enough to legitimate the state's exercise of power over that person. *Id.* The Commerce Clause is concerned less with fairness for individual defendants than with "structural concerns about the effects of state regulation on the national economy." *Id.* The nexus requirement of the Commerce Clause serves as "a means for limiting state burdens on interstate commerce;" it is "to ensure that State taxation does not unduly burden interstate commerce." *Id.*; *see Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of National Resources*, ___ U.S. ___, 112 S. Ct. 2019, 2024 (1992) (state or subdivision cannot avoid prohibition of Commerce Clause by curtailing movement of goods through subdivision rather than state as a whole).

Illustrating a prohibited undue burden on interstate commerce in the context of the facts in *Quill*, the court noted that "[w]hat is more significant, similar obligations

might be imposed by the Nation's 6,000-plus taxing jurisdictions." *Id.* at 1913n.6, *citing, National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 759-60 (1967). In *Bellas Hess,* the court had sounded this warning, to which the Court alluded in *Quill*:

> For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle . . . [National Bellas Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."
>
> *The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements.* Under the Constitution, this is a domain where Congress alone has the power of regulation and control. [Emphasis added, footnotes omitted].

Bellas Hess, 386 U.S. at 759-60.

The Texas Supreme Court's holding ensures that Diamond Shamrock's oil in foreign commerce will be subject to the very unjustifiable local entanglements from which the national economy should be free. Despite the court's apparent effort to distinguish those situations, (App. at 12a), Diamond Shamrock's oil is now taxable in every taxing jurisdiction on its route to Three Rivers. The nature of pipeline transportation requires that there be,

and the facts are that there is, a continuous flow of Diamond Shamrock's oil from Harbor Island to Three Rivers. (App. 57a-58a). Hence, there is a "year-round presence of a large quantity of Diamond Shamrock's oil at rest," (App. at 12a), in the pipeline throughout its length and in each of the taxing jurisdictions between Nueces County and Three Rivers. Under the court's holding, that oil, too, is taxable by each of the taxing jurisdictions through which the pipeline passes at the full tax rate, on the oil's full value. It does not matter that the oil in those jurisdictions is in transit because the oil in Nueces County, which the court held taxable, was in transit. It does not matter that such oil is under the control of a common carrier because the same carrier had the same control in Nueces County. Of course, those taxing authorities would argue with equal conviction, and as correctly, that they provide governmental services. The court's holding that the oil is taxable in Nueces County inexorably legitimizes the taxation of that oil in all these other jurisdictions.

This paradigm illustrates the multiple tax and administrative burdens to which Diamond Shamrock's oil would be subjected under the Texas Court's holding and, indeed, that any goods in transit that are taxed will be subjected to. It cannot be gainsaid that such taxation, with the attendant administrative requirements, does not result in unjustifiable local entanglements and is not an undue burden on foreign commerce. While the continuous presence of the oil may provide a basis for taxation under the Due Process Clause, it does not negate the undue burden on commerce and allow taxation under the Commerce Clause.

Whether these burdens are imposed only in Nueces County or in all the jurisdictions, they are nonetheless *undue* burdens, the kinds of undue burdens that the Commerce Clause nexus requirement operates to prevent. Neither the incidence nor the measure of the tax is tied to earnings which Texas made possible. *See Commonwealth*, 453 U.S. at 626. The mere presence of the oil while in transit does not provide a substantial nexus with Texas, Nueces, or any other county or taxing entity and a tax on that activity (if presence is an activity) is not authorized. *See Allied-Signal*, 112 S. Ct. at 2258. Moreover, taxation of this oil while it is merely passing through Nueces County, on the same basis as goods permanently present in the jurisdiction are taxed, results in the measure of the tax bearing no relationship to the activity in that jurisdiction. *See Commonwealth*, 453 U.S. at 629. The nexus requirements of the *Complete Auto* test proscribe the tax herein and, indeed, all taxes on goods actually in transit.

III. A BRIGHT-LINE IN-TRANSIT RULE IS NEEDED.

The Commerce Clause requires "that some aspects of trade generally must remain free from interference by the States." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *see, e.g., Goldberg*, 488 U.S. at 259 (*Complete Auto* placed limits on taxation of commerce). The prohibition of taxation of goods actually in transit is an age-old restraint that delimits such interference. This prohibition is completely consistent with and supported by the recent approach for analysis announced in *Complete Auto*. In that case, the court turned from erroneous formalistic determinations and those without relationship to economic

realities. *Complete Auto*, 430 U.S. at 279. But, nevertheless, the Court has not rejected all prior approaches for determining immunity. *See, e.g., Quill*, 112 S. Ct. at 1912, 1914.

In *Quill*, the North Dakota Supreme Court, shunned a "bright-line rule" of a pre-*Complete Auto* case for a more "flexible substantive approach," because subsequent developments in the law required rejection of the earlier principles. *See Quill*, 112 S. Ct. at 1908-09, 1914. In reversing the North Dakota court's judgment, this Court noted: "We have never intimated a desire to reject all established 'bright-line' tests." *Id.* at 1914. *Complete Auto* did not render "obsolete," the bright-line rule considered in *Quill* and that rule was "not inconsistent with *Complete Auto* and our recent cases." *Id.* at 1912. While the rule in *Quill*, like other bright-line tests, "appears artificial at its edges," "[t]his artificiality . . . is more than offset by the benefits of a clear rule." *Id.* at 1914, 1915. This Court thus upheld a bright-line rule which served as a "demarcation of a discrete realm of commercial activity that is free from interstate taxation". *Id.* at 1914.

All bright-line tests were not vitiated by the modern analyses and those approaches did not repudiate all of the nearly two hundred preceding years of Import-Export and Commerce Clause jurisprudence. *See id.; Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 189-90 (1983) (*Japan Line* established bright-line rule). Some formal demarcation of a discrete realm of commerce that must be free from state taxation is both permissible and warranted. This is certainly true where the formalism is not merely a trap for unwary draftsmen as was condemned in *Complete Auto*. The long-standing, bright-line rule

asserted herein, which has never been overruled or questioned, meets all the *Quill* criteria and should be applied.

The establishment of definite boundaries of legitimate state taxing authority is desirable and beneficial in this area which has been described as a "quagmire" and in which there is "much room for controversy and confusion" and little precise guidance to the states. *Quill*, 112 S. Ct. at 1915. It has been noted that the "vague and open-ended tests" of *Complete Auto* do not significantly serve "to protect reliance interests" or "to foster stability in the law." *Itel*, 113 S. Ct. at 1107 (Scalia, J., concurring). The prohibition of taxation of goods in transit should be applied in this case, and generally, to provide stability. Such a rule is particularly warranted to provide clear and simple guidance which "is highly important, both to the shipper and the State . . . so as to avoid all ambiguity or question." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974). Moreover, such a beneficial bright-line rule is, perhaps, even more desirable here, where foreign commerce which must be afforded heightened protection is at issue, than in *Quill* where only domestic commerce was involved.

CONCLUSION

For the foregoing reasons, and the reasons stated by Petitioner, which GM wholeheartedly endorses, General Motors Corporation, as Amicus Curiae, joins Petitioner's request that the writ of certiorari in this case be granted.

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